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NO. 96-1469
IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

UNITED STATES OF AMERICA,

Petitioner,

v.

HERNAN RAMIREZ,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR OHIO, ALABAMA, ALASKA, ARKANSAS, CALIFORNIA, DELAWARE, FLORIDA, HAWAII, IDAHO, ILLINOIS, KANSAS, LOUISIANA, MARYLAND, MICHIGAN, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, GOVERNMENT OF PUERTO RICO, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VERMONT, COMMONWEALTH OF VIRGINIA, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF *AMICI* INTEREST

Amicus curiae State of Ohio and 29 other *amici* States and Territories write to support the United States and to urge the Court to reverse the decision below.

Like the federal government, the *amici* States have enacted a variety of criminal laws that they are responsible for enforcing. In meeting that responsibility, they are deeply concerned about legal requirements that make the already-perilous job of law enforcement still more perilous, particularly with respect to the difficult task of apprehending alleged criminals. In this instance, the Ninth Circuit's efforts to balance the Fourth Amendment's bookend considerations of security and individual liberty failed to account for the real-world security risks that police officers face and improperly saddled them with a search-and-seizure burden that the Fourth Amendment does not require. As the federal statute governing such searches, 18 U.S.C. §3109, does not apply to the States, this brief expresses a view concerning only the propriety of the police officers' actions under the Fourth Amendment.

SUMMARY OF ARGUMENT

In measuring the reasonableness of a search under the Fourth Amendment, the Court first looks to history to determine whether a relevant tradition informs the content of the provision, then (if necessary) balances the law enforcement security interests presented against the individual liberty interests allegedly infringed. *See Wilson v. Arkansas*, 115 S. Ct. 1914 (1995). The Ninth Circuit's decision -- holding that unannounced entries causing property damage require more proof of exigency that those that do not -- is unsupported by history, balancing, case law or common sense.

Wilson v. Arkansas and *Richards v. Wisconsin*, 117 S. Ct. 1416 (1997), go a long way to answering the question presented. *Wilson* confirms that one of the elements of the reasonableness inquiry is whether the police officers complied with the common law requirement that law enforcement announce its presence before forcibly entering a residence. And *Richards* establishes that officers may abandon this formality when it would be "dangerous or futile" or would "inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." 117 S. Ct. at 1421.

Neither the text of the Fourth Amendment, *Wilson* nor *Richards* requires officers to meet two tests, rather than just one test, for establishing exigency. Either the officer has established the requisite risk to self or the objects of the search warrant, or the officer has not. Once officers meet this initial requirement, they are free to proceed with a surprise entry, even one that does in fact cause property damage, so long as any damage to property is incidental to the underlying search. The English common law experience is equally silent when it comes to embracing a rule by which officers must meet a new quantum of proof after an initially-permissible entry suddenly evolves into one concretely requiring the breaking of property. Nor have the States, either before or after 1791 and 1868, established multi-exigency requirements under the search-and-seizure requirements of their own Constitutions.

Balancing does not advance the Ninth Circuit's novel test either. *Wilson*, *Richards* and the common law do all of the security/liberty weighing that the Fourth Amendment requires. One of the reasons for the knock-and-announce requirement in the first place was the liberty interest in avoiding needless damage to property. *Wilson*, 115 S. Ct. at 1918-1919. Having given criminal defendants the benefit

of this interest once, the Fourth Amendment does not give defendants the benefit of the interest a second time. Neither law enforcement nor individuals are entitled to double count under the amendment.

A contrary approach, at any rate, would not be workable and would not meaningfully serve the values of the Fourth Amendment. First, such an intermediate burden of proof is not likely to be quantifiable or knowable. It would simply bring new unpredictability to a setting already laden with uncertainty. Second, a double-counting requirement would as likely aid officers as suspects. When it becomes necessary for officers to damage property (*e.g.*, break a window or door), any element of surprise quickly dissipates. The breaking of property therefore is apt to create new peril for the officer and add to, not subtract from, the initial explanation for commencing a forcible entry. Third, the addition of property values to the Fourth Amendment scale overprotects the well-to-do and underprotects the down-trodden. How could it be that the poor (who cannot afford to fix the lock on the door), the forgetful (who forget to lock the door) or the trusting (who choose not to lock the door) have fewer rights to "security" from "unreasonable searches" than their wealthy, conscientious, or less trusting neighbors? The Fourth Amendment applies as vigorously to the one group as it does to the other because the bedrock securities provided by the guarantee do not turn on haphazard fortuities, be they the size of an individual's house or the number of bolts on one's door.

ARGUMENT

THE COURT OF APPEALS ERRED IN CONCLUDING THAT POLICE OFFICERS MUST SHOW ADDITIONAL EXIGENCIES WHEN MAKING A NO-KNOCK ENTRY THAT CAUSES INCIDENTAL PROPERTY DAMAGE.

Wilson v. Arkansas, 115 S. Ct. 1914 (1995), and *Richards v. Wisconsin*, 117 S. Ct. 1416 (1997), set the initial terms for assessing the validity of a police officer's unannounced entry into a residence to execute a search warrant in light of "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV.

Wilson makes clear that the issuance of a search warrant does not extinguish the privacy rights of the objects of a search. A continued "element of the reasonableness inquiry" is whether the officers who execute the search warrant satisfy "the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing," including the requirement that officers knock and announce their presence before forcibly entering a building. *Wilson*, 115 S. Ct. at 1915.

Richards, at the same time, establishes an important exception to the *Wilson* rule. It says that the Fourth Amendment permits officers to abandon an announcement when it "would be dangerous or futile" or "would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Richards*, 117 S. Ct. at 1421.

In the decision below, the Ninth Circuit attempted to take these cases one step further. It held that police officers who otherwise have authority to make an unannounced entry under the *Richards/Wilson* standard must establish still more risks to themselves or evidence when making an entry that causes property damage to the house for which a search warrant has been issued. Failure to do so, the court held, requires suppression of the evidence. Because neither the words of the amendment, the common law, State practices, precedent from this Court nor common sense requires such a test, we respectfully submit that the Ninth Circuit erred in engrafting this new consideration onto the Fourth Amendment.

A. The Text And Context Of The Fourth Amendment Do Not Establish A Multi-Exigency Requirement.

Nothing about the words of the Fourth Amendment compels police officers to satisfy two levels of exigency in making forcible entries while executing a valid search warrant -- one to justify the surprise, the other to justify any damage to the owner's property. By its terms, the amendment focuses primarily on privacy, protecting in this instance the "right" to individual "security" in one's "house[]." The provision thus does not protect residences for their own sake but because people live in them and because people are entitled to feel secure from unreasonable intrusions when they retreat to the privacy of their homes. *See Katz v. United States*, 389 U.S. 347, 351 (1967) ("the Fourth Amendment protects people, not places"). *Cf. Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 304 (1967) (the "principal" object of the Amendment is the protection of privacy rather than property).

The amendment no doubt also preserves the general source of this expectation of privacy -- the ownership of property and what comes with it, the right to keep people out. And that is particularly true in the context of limitations on "seizures" of property, in which the limitation on the owner's possessory interest frequently is separate and apart from any invasion of the owner's privacy. *Soldal v. Cook County*, 506 U.S. 56 (1992) (stating that "the Amendment protects property as well as privacy" in invalidating seizure of mobile home). *See United States v. Good Real Property*, 510 U.S. 43 (1993). But that is not to say that the amendment requires law enforcement to meet additional tests above and beyond that already required by the Fourth Amendment simply because property is involved. Still less is that true when the exigency requirement established by the knock-and-announce rule exists in part to allow the occupant to protect his or her own property interests. *Wilson*, 115 S. Ct. at 1918-1919.

Other amendments and other statutes, it bears emphasizing, further protect against improper damage to property by government officials. Whether it be the Fifth and Fourteenth Amendments' prohibition against depriving property without due process or taking it without just compensation, or whether it be statutory causes of action provided by the federal and State governments for property damage occurring in this context, *see* Federal Tort Claims Act, 28 U.S.C. 2671, *et seq.*, Ind. Code Ann. § 35-33-5-7, N.M.S.A. 41-4-12 (New Mexico), O.R.C. 2933.231(D)(2) (Ohio), individuals have other recourses besides the exclusionary rule to vindicate these property interests.

B. No Multi-Exigency Requirement Existed At Common Law.

In assessing the reasonableness of a challenged search, the Court also looks "to the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing." *Wilson*, 115 S. Ct. at 1916. If a relevant tradition exists, one that suggests a meaning of the provision "ascribed to it by the Framers of the Amendment," *id.*, then the pre-ratification common law either may end the matter (if it speaks clearly to the situation at hand) or may offer guidance as to what the guarantee means, *see id.*

In this instance history offers a partial, but not a complete, answer to the question presented. All agree that one of the explanations for the knock-and-announce requirement at common law was the prevention of gratuitous damage to property. By announcing themselves, officers gave suspects an opportunity to let the officers in without the need for a forcible and potentially property-damaging entry. *Semayne's Case*, 5 Coke 91, 77 Eng. Rep. 194, 195-196 (K.B. 1603) ("the law . . . abhors the destruction or breaking of any house (which is for the habitation of man) by which great damage and inconvenience might ensue to the party when no default is in him"); *see Wilson*, 115 S. Ct. at 1918-1919.

But, at the same time, no common-law tradition required the sheriff to satisfy two gradations of exigency prior to entry. Either an exigency justified the unannounced entry or it did not. Once an exigency had been established, no courts required the sheriff then to pinpoint other exigencies each time property was incidentally damaged in the course of pursuing the by-then-established dangerous suspect or of preserving the by-then-established disposable

evidence. Indeed, to the State *amici*'s knowledge, not a single case from the pre-ratification English or colonial common law experience embraced such a multi-part showing.

One understandable limit on the sheriff's authority did exist, however. Law enforcement could not damage property for the sake of damaging it in the course of an investigation. Any damage had to be incidental to the need for a surprise entry, and thus "without unnecessary violence," *Barnard v. Bartlett*, 64 Mass. 501 (1852), with "no more force than was necessary," *Hubbard v. Mack*, 17 Johns. R. 127 (NY Sup. Ct. 1819). Still, the "longstanding requirement[] that the officers . . . avoid unnecessary damage to the premises," a limitation applicable to all searches and seizures, 2 LaFave, *Search and Seizure*, 4.10(d), at 673-674, does not advance the rule embraced by the Ninth Circuit. The pre-existing limitation on wholly unwarranted property damage in the course of executing a warrant circumscribes the whole entry, whereas the court of appeals adopted a separate and additional showing required to make the entry itself. This new rule has no foundation in the common law that gave birth to the knock-and-announce requirement and in the end disserves the careful balance between liberty and security established by the venerable rule.

C. No Multi-Exigency Requirement Existed, Or Exists, Under State Law.

Nor have any of the States on their own established the kind of multi-exigency showing that the Ninth Circuit demanded. Like the United States Constitution, virtually all of the State Constitutions protect the privacy of their citizens from unreasonable searches and seizures, many of them through provisions predating and serving as models for the Fourth Amendment. *See, e.g.*, Ala. Const. art. I, §5; Ark. Const. art. 2, §15; Conn. Const. art. I, § 7; Del. Const. art

I, § 6; La. Const. art. I § 5; Neb. Const. art. 1, §7; Nev. Const. art. 1, § 18; N.D. Const. art. I §8; P.R. Const. art. II, §10; R.I. Const. art 1, § 6; Wyo. Const. art 1, §4. *See generally* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977). And many of the States by statute specifically establish knock-and-announce requirements. *See e.g.*, Rev. Code Wash. §10.31.040; N.D. Cent. Code §29-29-08; Cal. Pen Code §1531; NY CLS CPL §690.50; HRS §803-37(Hawaii); O.C.G.A.§17-5-27(Georgia).

Yet, as at common law, none of the States has ever distinguished between "breakings" that require property damage and those that do not. One exigency standard governs all exceptions to the announcement rule. *See, e.g.*, *State v. Miller*, 7 Wash. App. 414 (1972); *State v. Sakellson*, 370 N.W. 2d 779 (N.D. 1985); *People v. Rodriguez*, 274 Cal. App.2d 770 (1969); *People v. Tracy*, 195 Cal. App. 3d 1402 (1987); *People v. Peterson*, 9 Cal. 3d 717 (1973); *People v. Rogers*, 59 Ill. App.3d 396 (1978); *Jewel v. Mills*, 66 Ky. (3 Bush) 62 (1867).

D. No Multi-Exigency Requirement Is Compelled By The Fourth Amendment's Balancing Requirement.

In measuring the reasonableness of a search, the Court also balances "the asserted governmental interests in preserving evidence" against the "individual privacy interests intruded upon" when the common law does not establish a dispositive tradition. *Richards*, 117 S. Ct. at 1421-1422 ; *Wilson*, 115 S. Ct. at 1916; *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977). Even such balancing, however, does not advance respondent's cause because any weighing of competing interests that the Fourth Amendment requires, the knock-and-announce rule already provides.

On the security side of the ledger, the Court has frequently noted the "weighty interest in officer safety." *Maryland v. Wilson*, 117 S. Ct. 882, 885 (1997). That consideration has special application in the context of the perilous enterprise of enforcing State narcotics laws, where the knock-and-announce rule frequently applies. "Statistics indicate that drug related violence is a growing contributor to police mortality. From 1977 to 1986, 6.5% or 57 of 875 slain officers died in situations involving drug crimes. In 1985, 7.6% of police murders were drug related, and in 1986, 10.6% of police murders involved drug matters." Allegro, *Police Tactics, Drug Trafficking, and Gang Violence: Why The No-Knock Warrant Is An Idea Whose Time Has Come*, 64 Notre Dame L. Rev. 552, 558 n.32 (1989) (statistics extracted from Federal Bureau of Investigation, Crime In The United States; Uniform Crime Reports 1977-1986). Recent statistics show that between 1985-1994, 53 of 708 slain officers died in drug related matters. Uniform Crime Reports, Law Enforcement Officers Killed and Assaulted 1994, at 31, 34.

Regrettably, statistics do not reveal the numbers of officers assaulted during the execution of warrants, let alone during the execution of warrants in drug cases or in the context of the pursuit of an escaped felon. However, the sheer number of injuries, together with this Court's cases, confirm the dangers inherent in such work. *See Michigan v. Summers*, 452 U.S. 692, 702 (1981); *Ker v. California*, 374 U.S. 23, 28 n.3 (1963).

On the individual liberty side of the ledger, the Court has frequently observed that individuals have a strong interest in protecting the privacy of their homes from unwarranted intrusions. *See Wilson*, 115 S. Ct. at 1916; *Maryland v. Buie*, 494 U.S. 325, 331 (1990). While the valid issuance of a search warrant, as here, diminishes those interests, it does

not extinguish them altogether. *Richards*, 117 S. Ct at 1421 n.5.

But these balancing requirements do not aid respondent because the knock-and-announce rule already accounts for the weighing of these interests. It does all of the balancing of individual liberties and officer security, in short, that the Fourth Amendment requires. In explaining one of the justifications for the announcement requirement, *Wilson* properly relied on the individual's liberty interest in being given a chance to admit the officers without damage to property. 115 S. Ct. at 1918-1919. No precedent from this Court, however, requires double counting, either on the security or the liberty side of the Fourth Amendment scale.

Such a requirement, moreover, would demand a lot from police officers who frequently must make quick judgments about when, how, or even whether, to proceed in trying to apprehend a criminal suspect. Two tests, instead of just one, would govern their conduct. They would first have to ask themselves whether the circumstances warranted a surprise entry. Then, if it did, they would have to establish additional exigencies when it became necessary to damage property in the course of the surprise entry. In view of the requisite need for surprise that prompted the initial decision to proceed unannounced, it is hard to imagine there being sufficient time to identify in any meaningful way other exigencies that would justify continuing with the already-begun entry. The hair-splitting distinctions that this new intermediate test would require police officers to make would itself imperil their safety, and indeed would probably lead to imprecise second-guessing in the courts. *See Griffin v. United States*, 502 U.S. 46, 58 (1991) (rejecting as unworkable a due process argument that "posits two different degrees of failure of proof -- a failure that is *sufficiently*

insufficient, to which *Turner* would apply, and one that is insufficiently insufficient, to which *Yates* would apply").

A separate role for property damage, above and beyond that which spawned the knock-and-announce rule in the first instance, also would not invariably help suspects of criminal activity. The chief explanation for forcible entries after all is the element of surprise. Yet an unannounced entry that requires damage to property (*e.g.*, a broken window or door) runs the risk of alerting suspects that visitors are afoot. At that point, the suspects's knowledge that law enforcement may be present further imperils officers, as it gives the suspects a chance to arm themselves, destroy evidence, or attack the officers using their superior knowledge of the inside of the house. In other words, if there is to be double counting here, it applies to individual liberties *and* officer protection, and more often than not will further tilt the scales in the officers' direction.

Finally, and perhaps most problematically, the time-honored protections served by the Fourth Amendment do not turn on chance or property wealth. By making officers establish additional justification for a forcible entry that requires damage to property, the Ninth Circuit's test makes the guarantees offered by the Fourth Amendment a victim of fortuities and wealth, rather than a steadfast safeguard for all people and all occasions. How can it be that the poor (who cannot afford to fix the lock on a door), the forgetful (who forget to lock a door) or the trusting (who choose not to lock a door) have fewer rights to "security" from "unreasonable searches" than their wealthy, conscientious, or less trusting neighbors? The Fourth Amendment protections offered to the one group apply equally to the other, because the guarantee's vitality does not turn on haphazard fortuities, most particularly the size of a man's castle or the number of locks on his or her door.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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